

## Attachment A: Calculation of Penalty per SWRCB Water Quality Enforcement Policy

The administrative civil liability was derived following the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy). The proposed administrative civil liability takes into account such factors as Peter and Lisa Andrada's (hereafter Discharger) culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

Each factor of the Enforcement Policy and its corresponding score for the violation is presented below:

### **Step1. Potential for Harm for Discharge Violations**

This step is not applicable.

### **Step 2. Assessment for Discharge Violations**

This step is not applicable.

### **Step 3. Per Day Assessment for Non-Discharge Violations**

The "per day" factor is calculated for each non-discharge violation considering the potential for harm and the extent of the deviation from the applicable requirements.

#### Potential for Harm

The Enforcement Policy requires a determination of whether the characteristics of the violations resulted in a minor, moderate, or major potential for harm or threat to beneficial uses.

Staff determined that the potential for harm is moderate because the characteristics of the violation present a substantial threat to beneficial uses, and the circumstances of the violation indicate a substantial potential for harm.

The Discharger failed to timely submit a Report of Waste Discharge (RoWD) or enroll under an applicable General Order<sup>1</sup> for discharges from irrigated cropland despite evidence indicating that the Discharger irrigates cropland for a commercial purpose. Irrigated cropland can be a source of sediment, pesticide residue, nitrate, and other waste discharged to the waters of the state. Unregulated discharges of such wastes can present a substantial threat to beneficial uses and/or indicate a substantial potential for harm to beneficial uses.

---

<sup>1</sup> The following General Orders are applicable to the Discharger: 1) General Order R5-2013-0100, *Waste Discharge Requirements General Order for Discharges from Irrigated Lands within the Central Valley Region for Dischargers Not Participating in a Third-Party Group* (Individual General Order); 2) General Order R5-2012-0116-R3, *Waste Discharge Requirements General Order for Growers within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group* (East San Joaquin Order); and 3) General Order R5-2013-0120, *Waste Discharge Requirements for Growers within the Tulare Lake Basin Area that are Members of a Third Party Group* (Tulare Lake Basin Order).

The Discharger undermined the regulatory program by failing to file a RoWD or timely enroll under an applicable General Order. Dischargers regulated under an applicable General Order either conduct monitoring or contribute to monitoring efforts to identify water quality problems associated with their operations. Regulated dischargers also report on the practices they engage to protect water quality. By failing to provide monitoring results or information on its practices, the Discharger impaired the Central Valley Regional Water Quality Control Board's (Central Valley Water Board) efforts to assess potential impacts and risks to water quality, and circumvented the Central Valley Water Board's ability to take necessary enforcement actions to address problems.

Additionally, the regulatory program is compromised when staff resources are directed to bringing dischargers into compliance rather than being available for outreach and assistance with regulatory compliance. Since the violation thwarts the Central Valley Water Board's ability to identify water quality risks, the violation has the potential to exacerbate the presence and accumulation of, and the related risks associated with, pollutants of concern. This, in turn, presents a threat to beneficial uses and indicates a substantial potential for harm.

#### Deviation from Requirement

The Enforcement Policy requires a determination of whether the violation represents a minor, moderate, or major deviation from the applicable requirements.

The deviation from requirement is major. During the period of non-compliance, the Discharger disregarded the regulatory requirements and rendered those requirements ineffective. The Discharger undermined the efforts of the Central Valley Waters Board's Irrigated Lands Regulatory Program by disregarding the requirement to obtain the appropriate regulatory coverage for its waste discharges. A discharger's regulatory coverage is foundational to the Board's efforts to protect water quality. The Orders adopted by the Central Valley Water Board specify the expectations and requirements for water quality protection, which do not apply until a discharger is covered by an appropriate Order. The requirements in the applicable Orders are rendered ineffective when a discharger has not gone through the process to obtain coverage under an applicable Order.

Table 3 of the Enforcement Policy prescribes a per day factor ranging from 0.40 to 0.70 for those violations in which the potential for harm is moderate and the deviation from the requirement is major. Based on the above factors, a per day factor of 0.55 is appropriate (see Table 3 on pg. 16 of the Enforcement Policy).

**Multiple Day Violations:** On 30 March 2016 and 18 April 2016, an Assistant Executive Officer of the Central Valley Water Board issued Water Code section 13260 Directive Letters (Directive) to the Discharger, which required the Discharger to obtain regulatory coverage for all commercially irrigated lands within 15 calendar days of receipt or face a potential administrative civil liability. The Directives were received by the Discharger on 1 April 2016 and 27 April 2016. Thus, regulatory

coverage was required no later than 12 May 2016. The Discharger failed to meet this deadline. The Discharger eventually submitted a Notice of Intent (NOI) on 1 March 2017. On 6 March 2017 the Discharger joined the East San Joaquin Water Quality Coalition and on 10 March 2017 it joined the Kings River Watershed Coalition Authority, coming into compliance 302 days after the later Directive's due date.

Violations under Water Code section 13261 are assessed on a per day basis. However, the violation at issue qualifies for the alternative approach to penalty calculation under the Enforcement Policy (page 18). Under that approach, for violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. For these cases, the Central Valley Water Board must make express findings that the violation: (1) is not causing daily detrimental impacts to the environment or the regulatory program; or (2) results in no economic benefit from the illegal conduct that can be measured on a daily basis; or (3) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. If one of these findings is made, an alternate approach to penalty calculation for multiple day violations may be used.

Here, the Central Valley Water Board finds that the Discharger's failure to submit a RoWD or NOI and join a Coalition is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Discharger's failure to submit a RoWD or NOI has detrimentally impacted the environment on a daily basis, since obtaining regulatory coverage does not result in an immediate evaluation of, or changes in, practices that could be impacting water quality. There is no daily detrimental impact to the regulatory program because information that would have been provided by the Discharger pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Discharger's failure to submit a RoWD or NOI results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is associated with costs of permit fees, groundwater monitoring, and preparing reports, such as an Annual Monitoring Report, which are outlined below.

Either of the above findings justifies use of the alternate approach to penalty calculation for multiple day violations. The minimum number of days of violation to be assessed in this case under the alternate approach is 16. However, because this amount does not result in a sufficient deterrent, the days of violation are increased to 27.

#### **Initial Liability Amount**

The initial liability amount for the violation calculated on a per-day basis is as follows:

$$\text{\$1,000/day} \times 27 \text{ days} \times 0.55 = \text{\$14,850}$$

#### **Step 4. Adjustment Factors**

There are three additional factors to be considered for modification of the amount of initial liability: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's history of violations. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

a) *Culpability: 1.3*

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for intentional or negligent behavior. The Discharger was given the score of 1.3, which increases the penalty. Central Valley Water Board staff sent notices on 16 January 2013 and 18 April 2013 to the Discharger describing the new water quality regulations and the required actions to comply therewith. The Discharger also received multiple Directives and Notice of Violations (NOVs) requiring the Discharger to obtain coverage. A pre-ACL letter was also sent to the Discharger. Despite knowledge of the regulatory requirements, the Discharger failed to come into compliance. The seven notices and failure to respond suggest the Discharger acted intentionally, or at least negligently, in ignoring the requirement to obtain regulatory coverage, resulting in a multiplying factor of 1.3.

b) *Cleanup and Cooperation: 1.4*

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given the score of 1.4. The Central Valley Water Board issued the Discharger two Directives and two NOVs in an effort to allow the Discharger to address the violation prior to the issuance of a complaint. Central Valley Water Board staff also visited the Discharger's Fresno County parcel and spoke to the Discharger about the Irrigated Lands Regulatory Program. The Central Valley Water Board Prosecution Team sent a pre-ACL letter to the Discharger, providing another opportunity to address the violation. The Discharger did not respond until the pre-ACL letter and did not come into compliance until after a meeting with the Prosecution Team. Cleanup is not applicable in this case.

c) *History of Violations: 1.0*

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier of 1.1 to be used. The Discharger was given the score of 1.0, as there is no evidence that the Discharger has a history of violations.

### **Step 5. Determination of Total Base Liability Amount**

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3.

- a) *Total Base Liability Amount: \$27,027.* (Initial Liability (\$14,850) x Adjustments (1.3)(1.4)(1.0)).

### **Step 6. Ability to Pay and Continue in Business**

As per the Enforcement Policy, “[t]he ability of a discharger to pay an ACL is determined by its revenues and assets.” The Discharger has the ability to pay the Base Liability Amount based on the value of the Discharger’s property and estimated revenues for their crop. According to the Fresno County Assessor’s Office, the parcel owned by the Discharger is a significant asset with a 2015 assessed value of \$364,405. According to the Madera County Assessor’s Office, the Madera County parcel owned by the Discharger is a significant asset with a 2016 assessed value of \$214,917. Revenue generated from the Discharger’s ownership of approximately 16 acres of wine grapes on the Fresno County parcel yielded an estimated \$60,887 in revenue according to the 2015 Fresno County Crop Report. Additionally, the Discharger’s ownership of 19 acres of almonds on its Madera County parcel yielded an estimated \$125,917 in revenue according to the 2015 Madera County Crop Report, resulting in estimated revenue of \$186,804. Thus, the Discharger has the ability to pay the administrative civil liability based on its revenue and assets and there are no factors under this category that warrant an adjustment.

### **Step 7. Other Factors as Justice May Require**

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for “other factors as justice may require” but only if express findings are made.

The costs of investigation and enforcement are “other factors as justice may require” and could be added to the liability amount. The Central Valley Water Board Prosecution Team has incurred a significant amount of staff costs associated with the investigation and enforcement of the violations alleged herein. While staff costs could be added to the penalty, the Prosecution Team, in its discretion, is electing not to pursue staff costs in this matter.

There are no factors under this category that warrant an adjustment.

## **Step 8. Economic Benefit<sup>2</sup>**

### ***Economic Benefit: \$17,563***

The economic benefit of noncompliance is any savings or monetary gain derived from the act or omission that constitutes the violation. Economic benefit was calculated using the United States Environmental Protection Agency's (US EPA) Economic Benefit Model (BEN)<sup>3</sup> penalty and financial modeling program, version 5.6.0. BEN calculates a discharger's monetary interest earned from delaying or avoiding compliance with environmental statutes.

The BEN model is the appropriate tool for estimating the economic benefit in this case. The benefit is calculated by identifying the regulation at issue, the appropriate compliance action, the date of noncompliance, the compliance date, and the penalty payment date.

Under the Irrigated Lands Regulatory Program, an individual may choose to comply with the program by either filing an NOI to get regulatory coverage as an "individual grower" under General Order R5-2013-0100 Waste Discharge Requirements General Order for Discharges from Irrigated Lands within the Central Valley Region for Dischargers not Participating in a Third-party Group (Individual General Order), or filing an NOI for regulatory coverage under a third-party group Order and joining the appropriate coalition for the area in which the discharger's land is located. Because the Central Valley Water Board cannot force the Discharger to join a coalition, the economic benefit calculation is based on the assumption that General Order R5-2013-0100 (Individual General Order) applied to the Discharger during its period of non-compliance.

The economic benefit was calculated based on delayed and avoided costs. Delayed costs are those costs that should have been born earlier, but that a discharger can and is still required to pay. Avoided costs are the costs of those compliance activities, which a discharger can no longer perform, and that a discharger would have conducted had they come into compliance earlier.

The economic benefit in this case has been calculated based on the verifiable costs associated with obtaining regulatory coverage under the Individual General Order, as well as estimates of other avoided costs that were required of the Discharger to comply with the Individual General Order.

The State Water Resources Control Board charged a Notice of Intent fee of \$50 and a permit fee of \$1,084 plus 6.70 per acre for farms 11 to 100 acres during

---

<sup>2</sup> Order R5-2013-0100 includes an estimate of average annual costs per acre related to that Order. The average annual costs are not used in this economic benefit analysis, since the costs represent an average cost, if the Order were applied Central-Valley wide. The cost estimates made in this analysis are based on the circumstances and facts related to this Discharger, rather than a broad class of dischargers.

<sup>3</sup> US EPA Economic Benefit Model, or BEN. At the time this document was prepared, BEN was available for download at <http://www2.epa.gov/enforcement/penalty-and-financial-models>.

the 2013-2014 billing years. A permit fee of \$1,010 plus \$6.70 per acre for farms 11 to 100 acres was required during the 2014-15, 2015-16, and 2016-17 billing years.<sup>4</sup> The Discharger has 35 acres of land irrigated for a commercial purpose, which results in an annual permit fee of \$1,319 for the 2013-2014 billing year and \$1,245 for each of the following billing years. The Discharger avoided paying these permit fees for four years.

Under the Individual General Order, the Discharger would be required to prepare and submit a Farm Water Quality Plan at an estimated cost of \$4,800. The Discharger would need to prepare Annual Monitoring Plans for 2014, 2015, and 2016 at a cost of \$2,400 per year. And the Discharger would also need to prepare a Management Practices Evaluation Work Plan at a cost of \$2,500. Additionally, the Discharger would be required to conduct groundwater monitoring for 2013 and 2014, at an estimated cost of \$3,204 per year. The groundwater monitoring cost estimate is based on sampling two wells<sup>5</sup> once for the constituents listed in the Individual Grower Order and includes labor costs and lab fees.

In summary, the estimated economic benefit associated with noncompliance is \$5,054 associated with permit fees, \$4,800 associated with the Farm Water Quality Plans, \$7,200 associated with the Annual Monitoring Plans, \$2,500 associated with the Management Practices Evaluation Work Plan, and \$6,408 associated with groundwater monitoring. The total estimated upfront cost is therefore \$25,962. Using BEN, the Discharger gained an economic benefit of \$17,563 after consideration of delayed and avoided costs.

## **Step 9. Maximum and Minimum Liability Amounts**

### ***a) Minimum Liability Amount: \$19,319.30***

The Enforcement Policy recommends that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team's estimate of the Discharger's economic benefit obtained from the violation is \$17,563. This number plus ten percent results in a Minimum Liability of \$19,319.30.

### ***b) Maximum Liability Amount: \$302,000***

The maximum administrative liability amount is the maximum amount allowed by Water Code section 13261, which is \$1,000 for each day in which the violation

---

<sup>4</sup> See section 2200.6 of the 2013-2014, 2014-15 and 2015-16 Fee Schedules at [http://www.waterboards.ca.gov/resources/fees/docs/fy13\\_14\\_fee\\_schedule\\_ilrp.pdf](http://www.waterboards.ca.gov/resources/fees/docs/fy13_14_fee_schedule_ilrp.pdf) [http://www.waterboards.ca.gov/resources/fees/docs/fy1415\\_fee\\_schedule.pdf](http://www.waterboards.ca.gov/resources/fees/docs/fy1415_fee_schedule.pdf) and [http://www.waterboards.ca.gov/resources/fees/water\\_quality/docs/fy1516\\_ilrp\\_fees.pdf](http://www.waterboards.ca.gov/resources/fees/water_quality/docs/fy1516_ilrp_fees.pdf)

<sup>5</sup> Based on the two parcels listed in the ACL Order, staff estimates that the Discharger has two irrigation supply wells, which would be sampled once per year.

occurs. The Discharger was in violation for 302 days, which results in a maximum liability of \$302,000.

**Step 10. Final Liability Amount**

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount for failure to submit a RoWD as required under Water Code section 13260 is **twenty seven thousand twenty seven dollars (\$27,027)**.